

**Safety-Kleen Corporation and Truck Drivers Union, Local No. 407 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local No. 1 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 8-CA-14173 and 8-CA-14876

October 12, 1982

### DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND HUNTER

On July 8, 1982, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge, to modify his remedy,<sup>2</sup> and to adopt his recommended Order, as modified herein.<sup>3</sup>

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> In adopting the Administrative Law Judge's Decision and recommended Order, we hereby modify the remedy to require that Respondent expunge from its files any reference to the discharge of Thomas E. Foster on September 2, 1980, and notify Foster in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

<sup>3</sup> In par. 1(c) of his recommended Order, the Administrative Law Judge uses the broad cease-and-desist language, "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate since it has not been shown that Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we have modified the recommended Order so as to use the narrow injunctive language, "in any like or related manner."

We have further modified the Administrative Law Judge's recommended Order to include the full reinstatement language traditionally provided by the Board. We also modify the proposed notice to conform with the provisions of the recommended Order.

265 NLRB No. 11

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Safety-Kleen Corporation, Warrensville Heights and Niles, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Thomas E. Foster immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered due to the discrimination practiced against him, in the manner set forth in the section of this Decision entitled 'The Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discourage membership in or activities on behalf of Truck Drivers Union, Local No. 407 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminating in regard to hire or tenure of employment of employees, or in regard to any term or condition of employment.

WE WILL NOT coercively interrogate our employees concerning activities on behalf of or in support of a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Thomas E. Foster immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him, plus interest.

WE WILL expunge from our files any reference to the discharge of Thomas E. Foster, on September 2, 1980, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

#### SAFETY-KLEEN CORPORATION

#### DECISION

#### STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard in Cleveland, Ohio, on July 27-29 and August 18, 1981, before Administrative Law Judge Charles W. Williamson. Administrative Law Judge Williamson having become unavailable to the National Labor Relations Board (herein the Board), before issuing a decision in this matter, these cases have been assigned to me for the preparation and issuance of a decision and other appropriate action.

The complaint in Case 8-CA-14173 was issued on October 20, 1980, based on a charge filed on September 3, 1980, by the Charging Party in that case named above (herein Local 407). The complaint in Case 8-CA-14876, together with an order consolidating cases, was issued on July 6, 1981, based on a charge filed on May 27, 1981, by the Charging Party in Case 8-CA-14876 named above (herein Local 1).

The complaint in Case 8-CA-14173 alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) at its Warrensville Heights, Ohio, facility by interrogating an employee on August 29, 1980, concerning union activities of its employees, and violated Section 8(a)(3) and (1) of the Act at that facility by terminating the employment of Thomas E. Foster on September 2, 1980, because of Foster's union or other concerted activity.

The complaint in Case 8-CA-14876 alleges that Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment of Charles Padden, Richard Milheim, and Ronald Vanasdal at its facility in Niles, Ohio, on or about May 23, 1981; and violated Section 8(a)(5) of the Act by failing and refusing to recognize or

bargain with Local 1 as the exclusive representative of its routemen at that facility.

The answers to the complaints deny the unfair labor practices alleged, but admit allegations of the complaints sufficient to justify the assertion of jurisdiction (Respondent, while engaged in the rental and servicing of parts cleaning machines at branch offices in various States, including Warrensville Heights and Niles, Ohio, during a recent 12-month period, received goods directly from outside Ohio at each of the Ohio branch offices mentioned of a value of \$50,000), and to support a finding that Local 407 is a labor organization within the meaning of the Act. It was stipulated at the hearing that Local 1 is a labor organization within the meaning of the Act.

Upon the entire record in this case, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

#### FINDINGS AND CONCLUSIONS

##### I. INTRODUCTION

The employees involved in this proceeding are employed at two of Respondent's branch offices as driver salesmen-service men (herein routemen or salesmen) whose duties include persuading customers to permit the installation on the customers' premises of equipment owned by Respondent for cleaning vehicle parts, and to use other services furnished by Respondent. The equipment involved apparently is not usually sold, but is rented to the customer so long as the latter desires to utilize Respondent's services. The salesmen are expected to service Respondent's machines, and some machines owned by customers, on the customer's premises, on a rather rigid schedule, by installing or leaving fresh tanks of cleaning fluid to be used in operation of this equipment. The routemen are also expected to sell the customers related items distributed by Respondent, such as brushes, cleaners, wiper blades, etc., which items are referred to in the records as "Allied Product."

The drivers are paid, in part, by commissions, for the services they perform. It also appears that branch managers receive substantial bonuses if the drivers perform scheduled services each week, "on-time," and this is reported in weekly forms to Respondent by Friday of that week.

##### II. CASE 8-CA-14173

This case involves the four drivers at Respondent's Warrensville Heights branch (referred to herein as "the Cleveland Branch") at the times material: Thomas E. Foster, Steven Sanducci, Joseph Bartok, and Noel Shriver.

Foster, who had been terminated in 1979, without his fault, from one of Respondent's branches, was reemployed at the Cleveland branch in March 1980 (all dates in this section are in 1980, unless otherwise noted). In filling out his job application, Foster noted that he had one traffic violation in the preceding 2 years, although he had, in fact, had a second traffic citation some 22 months previous; but, he testified, at the time he completed his application he did not recall this former viola-

tion. The Cleveland branch manager at the time, Paul Herbert, urged his superiors that Foster should be retained, notwithstanding the error on his application, because he was such a good salesman. George Mortimer, the regional manager of Respondent's Pittsburgh region, which includes both the Cleveland and the Niles, Ohio, branches, agreed, and on May 9 Foster was advised that Respondent had taken into account that he had "perhaps forgot[ten] this other violation," and that he would be retained, but would be on probation for 1 year and be required to take a defensive driving course.

It would appear that Foster quickly became one of Respondent's most productive salesmen, as indicated by a promotional newsletter put out by the Pittsburgh region, urging the salesmen in that region to greater sales efforts, in which, *inter alia*, the following appeared:

#### BRANCH OF THE PERIOD

Showing us all what a well-run Branch with talented salesmen looks like, Mark Wimmer backed up by Tom Foster, Noel Shriver, Steve Sanducci and Joe Bartok of the Cleveland Branch stole the show in period 7. . . . CONGRATULATIONS TO YOU MARK AND TO YOUR SALES TEAM FOR A SPLENDID PERFORMANCE IN PERIOD 7.<sup>1</sup> SALES AND SERVICE REPRESENTATIVE OF THE PERIOD

There's no doubt about the super job done in Period 7 by Tom Foster of the Cleveland Branch! Tom performed 295 services, put out 22 Part-washers; 3 I.C.'s; 11 C.O.M.S. and sold \$1,098.00 in Allied Product. This was certainly a fine effort by Tom. CONGRATULATIONS TO YOU TOM FROM THE PITTSBURGH REGION!

On August 25, Foster, Sanducci, and Bartok signed authorization cards for Local 407, and, on August 28, the Union sent a letter to the Cleveland Branch manager claiming to represent a majority of the routemen and requesting recognition of the union as the representative of the routemen for collective bargaining. Branch Manager Mark Wimmer (who had replaced Branch Manager Paul Herbert in June 1980) admits that he received the letter on August 29.<sup>2</sup>

Sanducci and Bartok were in the office when the letter from Local 407 was received. They recall Wimmer reacting with perturbation, advising Mortimer of its receipt on the telephone. After this telephone conversation, Mortimer called to talk with Sanducci. According to Sanducci's testimony, which is not denied, Mortimer asked how Sanducci was doing, and then asked, "What's going on," to which Sanducci replied, "Nothing." Mor-

timer again asked, "What is going on" Sanducci responded, "Nothing. I don't know what you are talking about." Mortimer said, "Come on. What is going on? What is going on down there?" Sanducci answered that nothing was going on, and asked, "Why are you calling me?" Mortimer then referred to the fact that, when there was some question about Sanducci's eligibility for the hospital plan, he had helped Sanducci to secure hospitalization insurance. Mortimer continued, "In the future, I would hope you would do me some favors, too." "You do me a favor, I do you a favor." Sanducci professed not to know what Mortimer meant, to which the latter responded, "I think you know what I mean," and asked to talk to Wimmer.

Foster came into the office after the other two. Mortimer also asked to talk to him. In the course of references to Foster's wife and children and to Foster's need to enroll in the safe driving course (Foster said that he had done so), and similar matters, Mortimer asked if there were any problems at the branch that he should know about, which Foster appears to have avoided answering, and ended by saying that he would help Foster with any problem concerning the safe driving course, commenting, "I might be needing a favor from you some day." During the course of this conversation, Mortimer told Foster that he "was doing a super job . . . an outstanding job."

According to Sanducci, Mortimer had never called to speak to him about work before.

The next workday was Tuesday, September 2. At the end of that day, Wimmer discharged Foster for allegedly "falsifying documents." The immediate cause, from Wimmer's testimony, was the fact that on three reports, two dated August 28 and one dated August 29, 1980, Foster stated that he had "pulled" (i.e., removed) Respondent's machines from the premises of three customers, apparently at the customers' request, when, in fact, he had not yet done so. Foster explained that in each case his truck was overloaded and he informed the customer that he would pick the machine up at a later time. Foster also testified, without contradiction, that he had told Wimmer on those occasions that he had been unable to pick up the machine at two of the customers, without any response from Wimmer. Wimmer's testimony does assert that there was room on Foster's truck to bring the machines in "on those particular days," but this testimony appears vague, not positive, and based not on personal recollection, but on after-the-fact calculations or estimates. I credit Foster.

According to Foster's testimony, which I credit, on September 2, Foster told Wimmer that he had brought in the machine from the third customer involved and showed it to Wimmer in the warehouse at Wimmer's request. Wimmer denied that Foster had returned the machine because the serial number on the machine did not match Respondent's records. To the extent Wimmer's testimony is different, it is not credited. Wimmer agreed, on cross-examination, that this discrepancy in serial numbers was not unusual where the driver who placed, or replaced the machine at the customer's premises did not keep a careful record. Foster, who had not placed this

<sup>1</sup> Respondent divides its sales year into 13 4-week periods, each starting on a Sunday and ending on a Saturday. The seventh period would be a 4-week period ending in mid-July 1980.

<sup>2</sup> It seems clear and I find that Wimmer had little difficulty in ascertaining the identity of the employees who had signed for the Union. Wimmer recalled that the letter from Local 407 said that "at least three of the people . . . wanted to bring the Union in." In a situation such as this, where only one of four employees did not join with the others in seeking union assistance, the probabilities are strong that Respondent would soon become informed, particularly where, as here, Respondent engaged in questioning the employees concerning their activities.

particular machine, asserted that this was the reason the serial numbers did not match in this case. There was no evidence that these alleged "falsifications" with respect to "pulling" these three machines caused any detriment to Respondent or benefited Foster.

Wimmer also asserted that Foster's alleged "falsification" of his employment application, his participation in a practice called "plugging tickets," and his failure to turn in cash receipts on one occasion in early July were factors in Wimmer's decision to discharge Foster. In some confusing testimony, Wimmer also indicated that he had suspicions that Foster was selling Respondent's products at unauthorized prices.<sup>3</sup> Each of these alleged reasons for Foster's termination will be considered hereunder.

1. The employment application incident, as has been noted, occurred well before Wimmer came to the Cleveland Branch and his testimony makes clear that he is ill-informed as to the details (he is in error as to the number of Foster's violations, the term of this probation, and the terms of Respondent's letter).

2. The so-called practice of "plugging tickets" is not fully or clearly explained in the record. It may refer to several similar practices, only one of which is referred to in any detail in the record.

Because Respondent places considerable emphasis on routemen performing prescribed services for customers (e.g., replacement of used drums of solvent at the customer's premises with drum of fresh solvent), on a fairly rigid schedule, and even makes the branch manager's bonus contingent on these services being performed and reported by the end of the workweek, a practice grew up at the Cleveland Branch (and perhaps elsewhere) for routemen who on their regular visits found the customer's place of business temporarily closed, to nevertheless leave drums of fresh solvent, without actually installing them, and write up the service as being performed, and sign the ticket with their own names on behalf of the customer.<sup>4</sup> The ticket would then be sent to Respondent's main office showing that the service had been performed on time.<sup>5</sup> Some of the routemen were instructed as to that practice by the then Cleveland Branch manager, Paul Herbert, who was replaced by Wimmer in June 1980. Within 2 weeks thereafter, Wimmer found out about this practice of "plugging tickets," and directed that it be stopped. It is significant that Wimmer concedes that from this point in late June Foster *did not* again engage in the practice of "plugging tickets."

According to Wimmer, however, about the time he replaced Herbert as branch manager at Cleveland, Respondent's main office informed him that several custom-

ers (Wimmer consistently said "four," but could recall only three) complained that they had not received the services for which they were being billed, and refused to pay. Notwithstanding that these alleged incidents occurred during Herbert's tenure, Wimmer says that Respondent deducted from him the bonuses that had been paid, presumably to Herbert, on these sales. Some of these incidents, but not all of them, Wimmer attributed to Foster. Wimmer recalled specifically that Respondent informed him that one of the three complaining customers, Mrs. Krantz of Street and Dirt Bike, had complained of being billed for services not performed by Foster. However, when called as a witness by the General Counsel, Krantz testified that she had not had any complaint about Respondent or its services and had never complained about being charged for services not performed. I credit Krantz who appears to be a disinterested third party.

3. At the end of a workday, on a Friday in early July 1980, Foster failed to turn in the invoices and cash receipts from his route. On the following Monday he turned in the invoices and the receipts collected. Foster, in his testimony seemed to equate this with Respondent's practice at the time of permitting routemen to give Respondent personal checks against their daily collection when the routeman had no opportunity to go back to the bank.<sup>6</sup> Wimmer says he discontinued the practice. When Wimmer brought this incident to the attention of Division Manager Mortimer, the latter instructed Wimmer not to fire Foster, but to watch him.

4. Lastly, as has been noted, there is no evidence to support the alleged suspicion that Foster sold Respondent's products at unauthorized prices. Foster denies that he did so.

### III. ANALYSIS AND CONCLUSIONS

#### A. Interrogation

Immediately upon being informed of Local 407's claim to represent the routemen at the Cleveland Branch, Regional Manager Mortimer called one of the four routemen at work—a most unusual action—to inquire what was going on at the branch. Shortly thereafter Mortimer spoke to another routeman at the branch office, in an attempt to find out what the problems were at the branch. When the men sought to avoid Mortimer's questions, he became insistent and suggested that cooperation by the men would be tied in to favors by Respondent. In these circumstances, I find that Respondent engaged in coercive interrogation in violation of Section 8(a)(1) of the Act.

#### B. Discharge of Foster

Foster was one of the best salesmen—at times the very best salesman—in the Pittsburgh region. In August Foster and two other routemen signed Local 407 authorization cards. On August 29, Respondent received the Union's claim to represent a majority of the four route-

<sup>3</sup> On cross-examination, Wimmer stated that he never raised this matter with Foster because "[t]here was nothing I could positively state or say why. But this made me suspicious."

<sup>4</sup> Wimmer's testimony indicates that there are on file with Respondent agreements by the customers which permit the dropoff of drums in just this manner.

<sup>5</sup> I infer from the record as a whole that the practice of "plugging tickets" may have included, on occasion, writing up tickets for submission to Respondent's main office when the drums of solvent had not actually been left at the customer's premises, or some other scheduled service had not actually been performed, when the driver anticipated performing the service the following week.

<sup>6</sup> On one occasion, while Herbert was branch manager, Foster admits giving Herbert a bad check.

men at the Cleveland Branch. At the end of the next scheduled workday, September 2, Branch Manager Wimmer discharged Foster.

The record shows that Wimmer was strongly opposed to the unionization of the routemen. Wimmer's precise reason for discharging Foster when he did is somewhat difficult to pin down. However, shortly before that date, Foster had noted on records which he turned in that Respondent's machines had been removed ("pulled") from the premises of three customers (apparently at their request), when, in fact, because his truck was fully loaded, Foster had merely promised to return to pick up the machines. Respondent argues that this constituted "falsification" of records justifying discharge. However, while such terminology (falsification) may be technically correct, it seems overblown here, where there is no evidence that Foster's action harmed Respondent or benefited Foster. Moreover, Foster testified, and Wimmer does not deny, that Foster informed Wimmer, about the time that he submitted these erroneous reports, that he actually had to return to the customer's premises for two of the machines, and Wimmer at the time made no comment.

In its brief (p. 5), Respondent narrows the reason for Foster's termination down to an asserted "confrontation" between Foster and Wimmer on September 2 concerning one of these machines. Thus, at the end of the day, on September 2, in response to Wimmer's inquiry, Foster advised that he had that day brought in one of the three machines. However, when Foster showed Wimmer the machine in the warehouse which he claimed to have brought back, Wimmer disputed Foster's assertion because the serial number on the machine did not match the number on Respondent's records. But at the hearing, Wimmer conceded, as Foster testified, that this discrepancy often happened because of the carelessness of previous routemen in recording serial numbers of replacement machines.

Wimmer also testified to number of other reasons for firing Foster, as follows: (1) Wimmer referred to an asserted "falsification" of Foster's application for employment, an omission, clearly not intentional, which occurred before Wimmer became branch manager, and which Respondent had long ago decided did not require Foster's discharge; (2) Foster's asserted "falsification" of records showing services performed as of a certain time, which had not, in fact, then been performed, which records Foster and other routemen had prepared in accordance with the instructions of the prior branch manager, and which, Wimmer conceded, Foster had discontinued as of the previous June at Wimmer's direction;<sup>7</sup> (3) Foster's failure in the previous July, on one occasion, to turn in cash receipts obtained on Friday until the following Monday, for which Regional Manager Mortimer at the time told Wimmer not to discharge Foster; and (4) an asserted suspicion that Foster had sold Respondent's

<sup>7</sup> Wimmer particularly asserted that one specified customer complained to Respondent that she had not received the services for which she was being billed—due to Foster's action—causing Wimmer to "lose money out of his pocket." That customer testified at the hearing that she had had no complaint with Respondent's services, and had never complained to Respondent about being billed for services she never received.

products at unauthorized prices, a matter concerning which, admittedly, there is no proof.<sup>8</sup>

Respondent, of course, has the right to discharge its employees for any reason, at any time, or for no reason at all, so long as it does not violate the Act, or other law or binding agreement. However, in this case there are a number of factors that indicate an improper motive in the termination of Foster. Thus, not only did Respondent actively welcome Foster back into its employ in March 1980, but, also because he was an outstanding salesman, rejected several improprieties on Foster's part as reasons to terminate him when they occurred. But immediately after being informed that three out of four salesmen at the Cleveland Branch had authorized a union to represent them, Respondent terminated Foster, according to Branch Manager Wimmer in substantial part because of those matters which Respondent had previously condoned.

The asserted immediate cause of Foster's discharge was three erroneous notations on company reports (that he had "pulled," i.e., removed, machines from the premises of three customers when he had not actually yet done so) which do not appear to have been of any significant consequence and two of which notations Wimmer knew and had passed off without comment prior to learning of the employees' union activity. It is also contended that Wimmer fired Foster because the serial numbers on one of these machines which Foster claimed to have brought in on September 2 differed from the number contained in Respondent's records. But here, too, Wimmer admitted that this occurred from time to time where the routeman who placed the machine was careless. It is not contended that Foster was at fault in this respect.

Respondent, however, contends (br. p. 8) that the fact that Respondent did not terminate all four of the routemen, or at least two of them "so that there might be at least a tie in the election process," argues against an improper motive in firing Foster. However, it is not necessary to fire all union members to chill an organizational attempt, one is frequently sufficient.<sup>9</sup> Respondent may well have thought that, at the moment, Foster was the only one of the unionized routemen who was vulnerable. It has been found that Branch Manager Wimmer was aware of the identity of the three employees who signed for the Union and the one who did not. By firing one employee among the union group, Respondent could (by replacing him) achieve the tie vote that Respondent suggests.

Based on the above, and the record as a whole, I am convinced and find that Respondent discharged Thomas E. Foster because of his activities in support of Local 407, in violation of Section 8(a)(1) and (3) of the Act.

<sup>8</sup> When Wimmer terminated Foster, he also brought up a bad check Foster had given Respondent at some time before Wimmer became branch manager. Though Respondent cross-examined Foster on the point, so far as I am aware, Wimmer did not mention this in his testimony or assert it as a reason for Foster's discharge.

<sup>9</sup> Though the record is silent on the point, Respondent in its brief asserts that there was a representation election at the Cleveland Branch which Local 407 lost.

## IV. CASE 8-CA-14876

This case involves the routemen at Respondent's Niles, Ohio, Branch, also referred to in the record and herein as the "Youngstown Branch." At times material to the complaint, the routemen at the Youngstown Branch were Charles Padden, Richard Milheim, and Ronald J. Vanasdale. The branch manager was Jacob (Jake) Klemann. The Youngstown Branch, like the Cleveland Branch, is included in Respondent's Pittsburgh region. At the time George Mortimer was the regional manager.

On May 5, 1981 (all dates in this section are in 1981 unless otherwise noted), Padden, Vanasdale, and Milheim signed authorization cards designating Local 1 as their bargaining representative.

Albert A. Meranto, business representative of Local 1, and district chairman of the Union's Youngstown District, attempted unsuccessfully, until late in the afternoon on Friday, May 22, to contact Mortimer, by phone. That afternoon Mortimer returned Meranto's earlier call. According to Meranto, he explained who he was, that he represented Local 1, and that he was from Youngstown. Meranto said he had Mortimer's employees "signed 100 percent," and that he would like to sit down with Mortimer and "sign a recognition agreement." Mortimer said he would be out of town until the following Wednesday, at which time "he would get back to [Meranto]." According to Mortimer, in this conversation Meranto said that "he had signed cards from several of my people" and that he would like to talk to Mortimer. Mortimer denied that Meranto said he wanted to talk about Respondent "signing a representation agreement," and asserted further that Meranto did not further identify the employees he claimed to represent, saying only that he covered the entire State of Ohio. Mortimer testified that he told Meranto that he would be going to Pittsburgh the following week and would call Meranto at the end of the week. He, nevertheless, did not do so and has had no further contact with Meranto. As between the two versions of this conversation, I credit Meranto. In particular I believe that it is much more likely that Meranto told Mortimer that he wanted to meet with Mortimer to secure Respondent's recognition of the Union as the employees' representative, as Meranto claims, than that he did not, as Mortimer says. That would be the principal, if not the only purpose of such a meeting. If Mortimer's version were accepted it would appear that Meranto did not state any reason for wanting to meet with Mortimer, nor did the latter ask the purpose. That is improbable. Similarly, since Meranto had 100 percent of the unit signed up, it would be likely that he said so. Certainly, he would not have claimed to represent merely "several employees," as to represent Mortimer asserts, rather than claiming at least majority representation. There is no dispute that Meranto did not specifically identify the Branch office that he claimed to represent, but there also seems to be no dispute that Meranto stated that he was based in Youngstown, although Mortimer also says Meranto stated that he had jurisdiction over the entire State of Ohio.

The employees at the Youngstown Branch were given off Friday, May 22, and Monday, May 25, as a Memorial Day holiday. When Milheim and Vanasdale arrived for

work on Tuesday morning, they found all the locks changed so that they could not get in to work. When Branch Manager Klemann arrived he told the routemen that they had been terminated as of the close of business on Friday, May 22. He advised them that each of them would receive a mailgram (which Klemann had sent from his home on Saturday) confirming their termination for "lack of performance increase in period 5." Respondent contends that over a week prior to May 22 it had decided to fire the three routemen as of that date for the reasons set forth hereunder.

Klemann testified that, about the middle of May, he was at his "wit's end" with the routemen, that "sales had dropped drastically and the entire branch was going downhill." For this reason, he asked Mortimer to come to the branch on May 14 and meet with the men. Mortimer did so. However, before considering that meeting and its aftermath, it will be useful to discuss the evidence of the Youngstown Branch drivers' performance for periods 3, 4, and 5.<sup>10</sup>

According to Respondent's records for the entire Pittsburgh region (Resp. Exhs. 13-15), ranking the drivers according to their commissions received on sale and services, Milheim and Vanasdale steadily increased their commission in each period, including commissions on "Services," "Placements," and "Allied Products." Padden, who was not hired until March 31, also shows an increase in each category in period 5 over period 4.<sup>11</sup> These three routemen were ranked about midway among all the drivers in the Pittsburgh region; a number of drivers who ranked below them are still employed by Respondent.

In contrast to the documents noted above, Respondent also introduced another exhibit (Resp. Exh. 11), assertedly prepared by Regional Manager Mortimer, which appears to show that Milheim had an increase in services in period 4 over period 3, but a decrease in services in period 5 over period 4.<sup>12</sup> This exhibit seems to show that Milheim had a decrease in Allied Product sales in periods 4 and 5 with respect to the previous periods. On the other hand, Vanasdale is shown to have increased his number of services in period 4 over period 3, and in period 5 over period 4. The exhibit shows, as Vanasdale recalled, that his Allied Product sales decreased, which Vanasdale attributed in part to his hand being in a cast during periods 4 and 5,<sup>13</sup> and also to his being regularly used in a territory other than his own during period 5.

<sup>10</sup> According to my calculations, period 3 ran from March 1 to March 28; period 4 ran from March 29 to April 25; and period 5 ran from April 26 to May 23.

<sup>11</sup> The only category showing a negative trend on these records are Respondent's calculations "annualizing" the routemen's commissions. It is not explained why Respondent expected that the routemen's annual commission would decrease while their actual commissions for each period increased.

<sup>12</sup> Milheim explained that this was due to his being assigned at the beginning of period 5 to a new territory in which the customers were dissatisfied with Respondent because of prior poor service by another branch office. He reported this to management.

<sup>13</sup> Mortimer's testimony indicates that Respondent normally tended to excuse poor performance due to an injury.

On cross-examination Milheim and Vanasdale testified to their recollection of their past performance in various areas. To the extent that their recollection appears to differ from the records, I have given it little weight.

Padden, who was a new employee, is shown by Respondent's Exhibit 11 to have less services and product sales in period 5 than in period 4, which he attributed to the fact that in period 4 Klemann was riding with him and assisting in his sales and services, while in period 5 he was performing alone. The record indicates that normally new employees are not evaluated by Respondent until after 90 days.<sup>14</sup>

About the first of May 1981, Respondent established a new standard of performance for the routemen, Klemann advising them that they would be expected to make \$25 a day in commissions, which he said would give them \$6,000 a year. However, Klemann told Padden that, because he was so new, he would not be expected to achieve this goal at that time. Padden states that, nevertheless, he made the \$25-a-day standard the first week, but fell slightly below the following 2 weeks before he and the other two routemen were terminated. Vanasdale asserts that the first week, still hampered by the injury to his hand, he fell below the standard, but exceeded the \$25-a-day standard the following 2 weeks. Milheim testified that during the first week he exceeded the new standard, but fell slightly below on the second week. About May 20, Klemann spoke to Milheim about this, and, after hearing Milheim's explanation for his failure to make the \$25 standard, told Milheim that he would be given 2 weeks to come up to the standard and expressed confidence in his ability to accomplish this. Milheim exceeded the \$25 standard on May 20 and 21, for which he was complimented by Klemann. None of the routemen worked on May 22. All were discharged as of the end of that day for asserted poor performance, as has been noted.

Mortimer and Klemann testified that after an early morning meeting with the Youngstown routemen on May 14 that they agreed that Klemann should discharge all three routemen at the end of that period (which would end May 23), because of their performance and apparent lack of enthusiasm.<sup>15</sup>

Mortimer states that on the next day, May 15, he sent the following memorandum to Klemann, which Klemann asserts that he received on May 18. Mortimer also says that he sent a copy of the memo to his superior, Clyde Phillips, who also says he received this memo on May 18. The memo states:

Jake:

After talking with your sales reps Paden [sic], Milheim and Vanasdale yesterday and after going over their production during Periods 3, 4, and 5, I advise you seriously consider replacing these three men.

<sup>14</sup> On March 6, after his first 90 days, Milheim was given a favorable rating and a \$10 raise for satisfactory performance. Similarly Vanasdale was given an excellent appraisal and a \$10 raise on April 16. Klemann contends both immediately dropped drastically, or went downhill.

<sup>15</sup> Klemann asserts that after this meeting "we [Klemann and Mortimer] agreed that all three should be terminated." Mortimer testified that Klemann said that "he would terminate them at the end of the period."

Their lack of enthusiasm for the job was apparent and as you can see their figures have been consistently below objectives.

You should plan to make your changes at the end of Period 5.

However, there are a number of factors that would indicate that Klemann had not anticipated terminating the Youngstown routemen as of May 22. As has been noted, on May 20, Klemann told Milheim that Milheim would have two additional weeks to start making the new \$25 commission standard, and, in fact, expressed confidence that Milheim could do so. On May 21, Klemann congratulated Milheim for making the standard on May 20 and 21.

On Tuesday, May 19, Klemann took pains to compliment and thank Vanasdale for the production he had accomplished the preceding week.

On May 21, Klemann suggested to Padden that he work on Friday, May 22, and take off Tuesday, May 26, from work instead, which Klemann admits would not be possible if Padden were to be discharged on May 22.

Also, on Tuesday, May 19 (or Wednesday, May 20), Klemann called Padden into his office to ask if Padden were having trouble with his job, and when Padden replied that "there was a lot about the product" that had not been explained to him, Klemann gave him an instructional book to take home and study, explaining that "it would give [Padden] the product knowledge that [he] needed."

As of May 22, Klemann did not have replacements for the three routemen. He had interviewed one man who promised to come to work on June 1. On Saturday, May 23, Klemann called Manpower (temporary help) for two additional men to begin work on May 26.

#### V. ANALYSIS AND CONCLUSIONS

These three discharges present a very difficult case. Though Respondent contends that each of the three employees was terminated for poor performance on the job, there is substantial evidence indicating that their work performance was not as bad as Respondent contends, or was affected by factors which, under ordinary circumstances, one would expect Respondent to excuse—two of the employees, who were recently rated as good or superior producers, were hampered by injury or other extenuating circumstances; and the third was a new employee, who the branch manager had said would be given more time to meet Respondent's standards.

It is further strange that, according to Respondent's own account, having delayed these terminations for 9 days, Respondent nevertheless felt impelled to discharge its entire sales force at one stroke on the day Respondent learned that they had joined the Union, even though Respondent had no one ready to replace them.<sup>16</sup> I would

<sup>16</sup> Respondent says that it decided on May 14 to discharge the three routemen on May 22. But on that date it had only one replacement who promised to come to work on June 1. On Saturday, May 23, Respondent first contacted Manpower for temporary help.



not expect such conduct from an organization like Respondent's, so strongly geared to sales and service.

Even though it is stated that Respondent's branch manager had decided on May 14, at the regional manager's suggestion, to fire the three routemen on May 22, the record shows that the branch manager, in the week prior to May 22, engaged in conduct quite inconsistent with an intention to let these three salesmen go on that date.

However, there is no getting around the fact that not only did the branch manager and the regional manager testify that they decided on May 14 to discharge the three salesmen on May 22, but also both of them and the regional manager's superior testified that, by May 18, the regional manager had confirmed this in writing by a memo in which he recommended that the branch manager "seriously consider replacing these three men" as of May 22. While I might be inclined, on this record, to discredit the branch manager, I have no basis for discrediting the regional manager and his superior. I therefore find that the memo is genuine and antedates the Union's request for recognition.

This leaves then only one possibility that I can see, that notwithstanding the memo, the branch manager would not have fired the sales force on May 22 except for the fact that the Union's telephone call requesting recognition came in that day. There is some evidence that would support that proposition, as I have noted, but not enough, in my opinion, to justify a finding that the discharge of Vanasdale, Milheim, and Padden violated Section 8(a)(1) and (3) of the Act.

In the absence of any other evidence of bad faith on Respondent's part at this branch, I also find that Respondent did not violate Section 8(a)(5) by failing and refusing to recognize and bargain with Local 1 as the representative of the routemen at the Youngstown Branch.

In the circumstances, I shall recommend the dismissal of the allegations that Respondent violated Section 8(a)(1), (3), and (5) in Case 8-CA-14876.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 407 and Local 1 are each a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating employees concerning their union activities, Respondent violated Section 8(a)(1) of the Act.
4. By discharging Thomas E. Foster because of his support of Local 407, and activities on its behalf, Respondent violated Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

It having been found that Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated against Thomas E. Foster in violation of the Act, it will be recommended that Respondent offer Thomas E. Foster immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position at its Cleveland, Ohio, branch, without prejudice to his seniority or other rights and benefits, and make him whole for any loss of pay or benefits which he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to that he would have earned as wages and other benefits from the date of his termination to the date of his reinstatement, less his net interim earnings during that period, and interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

#### ORDER<sup>17</sup>

The Respondent, Safety-Kleen Corporation, Warrensville Heights and Niles, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Discouraging membership in or activities on behalf of a labor organization by discriminating in regard to hire or tenure of employment of employees, or in regard to any term or condition of employment.
- (b) Coercively interrogating employees concerning activities on behalf of or support of a labor organization.
- (c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

- (a) Offer Thomas E. Foster immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position at Respondent's Cleveland Branch, and make him whole for any loss of earnings or benefits he may have suffered by reason of the discrimination against him, in accordance with the provisions set forth in the section hereinabove entitled "The Remedy."

(b) Expunge from its files any reference to the discharge of Thomas E. Foster on September 2, 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-

<sup>17</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.



cards, personnel records and reports, and all other records necessary to effectuate the Order herein.

(d) Post at its Warrensville, Ohio, branch, also known as the Cleveland Branch, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately

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<sup>18</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case 8-CA-14876 be and it hereby is dismissed as to alleged violations of the Act not found hereinabove in this Decision.